

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

TYRONE EUGENE YATES,

Petitioner,

v.

**CRIMINAL ACTION NO.: 3:06-CR-20
CIVIL ACTION NO.: 3:15-CV-90
(GROH)**

UNITED STATES OF AMERICA,

Respondent.

**ORDER DECLINING TO ADOPT REPORT AND RECOMMENDATION
AND DENYING PETITIONER'S § 2255 MOTION**

This matter is before the Court for consideration of a Report and Recommendation (“R&R”) issued by United States Magistrate Judge Robert W. Trumble. ECF No. 139.¹ Pursuant to this Court’s Local Rules, this action was referred to Magistrate Judge Trumble for submission of a proposed R&R. On August 6, 2015, Magistrate Judge Trumble issued the R&R in which he recommended that this Court deny Petitioner’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“§ 2255”), and dismiss it as an unauthorized second or successive motion.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge’s findings to which objection is made. However, this Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge to which no objections are made. Thomas v. Arn, 474 U.S. 140, 150 (1985). Failure to file objections in a timely manner

¹ All references to docket numbers relate to the criminal action number.

constitutes a waiver of *de novo* review and a petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).

In this case, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, objections to Magistrate Judge Trumble's R&R were due within fourteen days after being served with a copy of the R&R. Petitioner was served with the R&R on August 10, 2015. To date, neither party has filed objections. Accordingly, this Court will review the R&R for clear error.

Upon careful review of the R&R and other materials in this case, it is the opinion of this Court that the Petitioner's numerically second § 2255 [ECF No. 80] was not denied on the merits, but on a procedural ground.² Therefore, the Petitioner's instant, and numerically third, § 2255 is not a procedurally barred second or successive motion. Further, on October 21, 2015, the Fourth Circuit denied the Petitioner's motion for authorization to file a second or successive § 2255 motion. Order, In re Tyrone Yates, No. 15-316 (4th Cir. Oct. 21, 2015). The Fourth Circuit denied the Petitioner's motion based upon its finding that the substance of his § 2255 motion³ provided him with no cognizable relief.⁴ Id.

² The Petitioner's numerically second § 2255 was denied by Magistrate Judge Kaul on May 3, 2011. ECF No. 91. Magistrate Judge Kaul's R&R was later adopted on October 18, 2011 [ECF No. 95], and the Petitioner's numerically second § 2255 was dismissed. Magistrate Judge Kaul's R&R recommended denying the Petitioner's § 2255 motion because his "ineffective assistance of appellate counsel claim [was] procedurally barred . . . [as] it [was] already raised on appeal" ECF No. 91 at 13.

³ The § 2255 motion that the Fourth Circuit refers to in its October 21, 2015 Order is substantively the same § 2255 motion that the Petitioner filed with this Court on July 27, 2015, which is the Petitioner's numerically third § 2255. ECF No. 135.


⁴ The Fourth Circuit denied the Petitioner's "motion on the ground that the holding in Johnson, even if applied retroactively to cases on collateral review, would entitle [the Petitioner] to no relief." Order, In re Tyrone Yates, No. 15-316 (4th Cir. Oct. 21, 2015).

Accordingly, the Court **DENIES** the Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [ECF No. 135], and **ORDERS** that it be **DISMISSED WITH PREJUDICE**. This matter is **ORDERED STRICKEN** from the active docket of this Court. The Clerk is **DIRECTED** to enter judgment for the Respondent. As the Court denies the Petitioner's § 2255 motion on the merits in accordance with the Fourth Circuit's October 21, 2015 Order, the Court hereby **DENIES** a certificate of appealability.

The Court further **DECLINES TO ADOPT** Magistrate Judge Trumble's Report and Recommendation. ECF No. 139.

The Clerk is **DIRECTED** to transmit copies of this order to all counsel of record and the *pro se* Petitioner.

DATED: November 5, 2015



GINA M. GROH
CHIEF UNITED STATES DISTRICT JUDGE